Supreme Court, U.S.
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No. 94-1712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALTON ROMERO, M.D., *et al.*,
Petitioners,

v.

THOMSON NEWSPAPERS (WISCONSIN), INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Louisiana Supreme Court violate federal constitutional law when it granted summary judgment against a defamation plaintiff who was unable to show material falsehood?

PARTIES AND LIST PURSUANT TO RULE 29.1

The parties are as stated at Pet. Cert. ii. Respondent Thomson Newspapers (Wisconsin), Inc. is a Delaware corporation that is the successor to a formerly existing corporation, respondent Thomson Southwest, Inc. Both were and are wholly owned through intermediate wholly-owned corporate entities by The Thomson Corporation, a publicly held Ontario corporation.

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BRIEF IN OPPOSITION

Respondents respectfully pray that the petition for a writ of certiorari to the Supreme Court of Louisiana be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 648 So. 2d 866 and is reproduced at P.C.A. 1. The Civil District Court of the Fifteenth Judicial District and the Court of Appeal of Louisiana, Third Circuit, did not issue opinions; their orders are reproduced at P.C.A. 13 and 16, respectively.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered January 17, 1995. P.C.A. 1. The petition for certiorari was filed April 17, 1995, and received by counsel for respondents on or after April 20, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This Court lacks jurisdiction because the decision rests on an independent and adequate state ground, as is discussed *infra* pp. 6-7. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of Louisiana, Article I, § 7, provides:

> "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."

The First and Fourteenth Amendments to the Constitution of the United States are reproduced in part at Pet. Cert. 1-2.

STATEMENT

An article in the Lafayette, Louisiana *Daily Advertiser* on May 13, 1992, reported a study by Public Citizen's Health Research Group of the incidence of Caesarean section deliveries at 2,657 hospitals in 34 states throughout the country. As the article reported, the study found that the highest rate in any of those 2,657 hospitals was at Abrom Kaplan Memorial Hospital in Kaplan, Louisiana, where the study said 57.5% of babies were delivered by Caesarean surgery, compared to a national rate of 22.7%. The article also quoted comments on these results: by the director of the study, that "Louisiana's women are being butchered by their obstetricians in the way they do so many c-sections," P.C.A. 4; and by the president of the Greater New Orleans Obstetrical and Gynecological Society, that "Public Citizen had overstated the problem." *Id.*

The seventeenth paragraph of the article mentioned petitioner. The article reported that when asked about the study, the administrator of Abrom Kaplan Memorial Hospital

> "attributed that hospital's high rate to the only obstetrician at the hospital, Dr. Alton Romero. Romero is nearing retirement and only attends long-time patients who have had previous children—the category of women most likely to have a Caesarean." P.C.A. 4-5, 20.

Dr. Romero and his wife, petitioners here, sued in Louisiana state court for defamation. Respondents—the publisher, reporter, and others employed at *The Daily Advertiser*—moved for summary judgment. The court denied the motion and a state intermediate appellate court denied review. P.C.A. 13, 16. The Supreme Court of Louisiana reversed and ordered that summary judgment for respondents be granted. P.C.A. 10-11.

The Supreme Court pointed out, P.C.A. 9, that petitioners had identified only two statements in the article that could be challenged as not precisely true:

1. Dr. Romero's Caesarean rate, he said, was 53.5% of births, not 57.5%. P.C.A. 5.

2. Dr. Romero was not, he said, nearing retirement in 1992, although concededly the hospital administrator had told the reporter that Dr. Romero's practice "maybe was semi-retired." P.C.A. 5.

The Supreme Court of Louisiana held that:

> "Plaintiffs have shown no false statements in *The Daily Advertiser's* article other than the reference to Dr. Romero as nearing retirement and a possible discrepancy in his Caesarean rate.
>
> * * *
>
> "What *The Daily Advertiser* said about Dr. Romero was substantially true. Counsel could not pinpoint false statements in oral argument or brief. Since plaintiffs have failed to show false factual state-

ments in the article, they cannot avoid summary judgment."

P.C.A. 9-10. "*The Daily Advertiser* story was constitutionally protected *truthful* speech on a matter of public interest and concern." *Id.* at 10 (emphasis supplied).[1]

REASONS FOR DENYING THE WRIT

The Supreme Court of Louisiana held, with ample basis, that the article was not actionable because it contained no material defamatory falsehood. P.C.A. 10. Whether tested under the First and Fourteenth Amendments, or under Louisiana's own constitution and law of defamation, the complaint for that reason failed. The Louisiana Supreme Court gave Dr. Romero the benefit of treatment as a private figure, P.C.A. 9, and it also agreed with him that opinion was not entitled to protection if it implied a false statement. P.C.A. 8. He lost, not because he was subjected to too demanding a standard, but because he could not show that any material statement about himself in the article was untrue. P.C.A. 10.

On this record, the decision clearly was not only consistent with, but compelled by, the First and Fourteenth Amendments to the Constitution of the United States.

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[1] The Supreme Court added:

"The retirement statement was based on the reporter's conversation with Ray Landry [the hospital administrator]. Reporter Hawkings made a good faith effort to check his facts. The statement that Dr. Romero was nearing retirement, although not precise, had a reasonable basis because Landry described Dr. Romero as having a limited, semi-retired practice. Thus, Hawkings' report was substantially true. *Otero v. Ewing* [165 La. 398, 115 So. 633 (1927)]. The Caesarean section rate was based on the published report, and the discrepancy claimed by Dr. Romero is insignificant. The newspaper also included the hospital's explanation: 'a large number of repeat Caesarean patients.'"

P.C.A. 9-10.

Moreover, it is fully sustainable based on the Louisiana Supreme Court's construction of the requirement of material falsity that is part of Louisiana's defamation law and the free-press guarantee of the Constitution of Louisiana. That construction of Louisiana law is not subject to review in this Court.

I. THE COURT CORRECTLY HELD THAT PETITIONERS COULD NOT RECOVER WHEN THEY FAILED TO SHOW MATERIAL FALSEHOOD.

The defamatory falsehood to which petitioner claimed he was subjected was that instead of delivering 57.5% of his patients' babies by Caesarean section, as the article reported, the correct figure was 53.5%—compared to a national average which he did not challenge of about 22.7%. It is difficult to take such a quibble seriously. The Supreme Court of Louisiana not surprisingly held this difference inconsequential as a matter of law. P.C.A. 10. It also held "substantially true" the reference to Dr. Romero's being near retirement. P.C.A. 10. The report that the director of the study had referred to Louisiana women as being "butchered" by obstetricians performing excessive numbers of Caesareans, the Supreme Court held, was accurately reported, was hyperbole not directed particularly at Dr. Romero, and did not imply a falsehood. P.C.A. 9. *Cf. Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").

Under the First and Fourteenth Amendments, "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986). Moreover, the defamation laws of the states, like Louisiana's, would preclude any other result. "The common law of libel takes but one approach to the ques-

tion of falsity . . . . It overlooks minor inaccuracies and concentrates upon substantial truth." *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991).

II. THE DECISION RESTS ON LOUISIANA LAW.

The Louisiana Supreme Court held that Louisiana law provides that "[t]ruth is a defense" and "unimportant details need not be accurate." P.C.A. 8, citing *Otero* v. *Ewing*, 165 La. 398, 115 So. 633 (1927). It also explicitly relied on the free-press guarantee of Article I, § 7, of the state constitution. It explained in detail the restrictions Louisiana law places on defamation actions, and that under Louisiana's free press guarantee "[s]ummary judgment is favored" in such cases. P.C.A. 8.

The Louisiana Supreme Court's holding, citing a 1927 Louisiana case that relied only on state law, that "[t]ruth is a defense," P.C.A. 8, is certainly an adequate and independent state ground. The Louisiana court's legal discussion understandably opened by briefly reviewing the line of cases after *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to explain the federal constitutional restraints on state defamation actions, observing that "[s]ince *New York Times Co.* v. *Sullivan* . . . the law of libel and slander has been delineated by federal constitutional law." P.C.A. 6. But after providing that context, it explained that for a private figure, which it held Dr. Romero to be, P.C.A. 9, state law had greater leeway:

> "The standard by which a negligent publisher of defamatory falsehoods is liable to a private figure plaintiff for compensatory damages is left to state law. *Gertz* [v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)]. The Louisiana Constitution guarantees freedom of the press in Article I, § 7 . . . ."

P.C.A. 7. The opinion accordingly turned to the applicable Louisiana constitutional and defamation law. Citing and quoting Article I, § 7, of the Louisiana Constitution, it held that in Louisiana:

—"Truth is a defense, and it is sufficient if an allegedly libelous article is substantially true; unimportant details need not be accurate" P.C.A. 8, citing *Otero* v. *Ewing*, 165 La. 398, 115 So. 633 (1927).

—"An expression of opinion on a matter of public concern, which does not imply false fact, cannot be the basis of a defamation action." P.C.A. 8, citing *Mashburn* v. *Collin*, 355 So. 2d 879 (La. 1977).

—"If a statement expresses an opinion, a defamation action must fail, unless the opinion implies a false and libelous fact and the opinion was expressed with actual malice." P.C.A. 8, citing *Bussie* v. *Lowenthal*, 535 So. 2d 378 (La. 1988).

—"Summary judgment is favored in defamation cases . . . ." P.C.A. 8, citing *Sassone* v. *Elder*, 626 So. 2d 345 (La. 1993).

Thus Louisiana law compels the result in this case, just as would the First and Fourteenth Amendments. The Louisiana court's explicit reliance on state law was clearly enough an independent and adequate basis for the decision, and one this Court will not review. *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Fox Film Corp.* v. *Muller*, *supra*. "By its very definition the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris* v. *Reed*, 489 U.S. 255, 264 n.10 (1989).

Indeed, rather inconsistently with their attempt to characterize this as a federal-law decision, petitioners acknowledge and criticize the state supreme court's holding on Louisiana defamation law as exceeding First and Fourteenth Amendment requirements. They complain of what they call "the Louisiana Supreme Court's disdain for defamation cases," P.C.A. 12, and contend that Lou-

isiana's protection of the press by summary judgment "CIRCUMVENTS FEDERAL CONSTITUTIONAL LAW." Pet. Cert. 11. They object that

> "the Louisiana Supreme Court has fashioned a separate dichotomy for motions for summary judgment in defamation cases as a way of circumventing federal constitutional law when it suits its purposes."

Pet. Cert. 15-16. Petitioners are correct that Louisiana law does place a higher burden on plaintiffs in defamation cases than it does in other state civil cases, as the Louisiana court pointed out in one of its earlier decisions that it cited. See *Sassone, supra,* 626 So. 2d at 352. However, the standard Louisiana has adopted for defamation cases, petitioners elsewhere acknowledge, "is essentially the standard set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)." Pet. Cert. 14; see also *Sassone, supra,* 626 So. 2d at 351. And even if Louisiana chose to grant greater protection to the press than the minimums the federal Constitution requires, the Constitution does not prohibit it from doing so. Indeed, many states have established protections for the press that exceed those of the U.S. Constitution.[2] Louisiana's holding that summary judgment should be granted because

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[2] For example, states have placed on defamation plaintiffs a higher burden than is required by this Court's decisions. See, e.g., *Sisler* v. *Gannett Co.*, 104 N.J. 256, 516 A.2d 1083, 1091-93 (1986) (adopting "actual malice" standard where statement involves a matter of public concern and private-figure plaintiff "has voluntarily and knowingly" engaged in conduct implicating legitimate public interest); *Diversified Management, Inc.* v. *Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (adopting "reckless disregard" test of *St. Amant* v. *Thompson*, 390 U.S. 727, 730-31 (1968) for private-figure cases involving matters of public or general concern); *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571-72 (1975) (adopting "gross irresponsibility" standard of fault where article about private figure "is arguably within the sphere of legitimate public concern").

substantial truth is a defense does not call for review under the discretionary jurisdiction of this Court.

III. NO MISAPPLICATION OF FEDERAL LAW OCCURRED.

Ignoring the court's holding under state law that the article is "substantially true," P.C.A. 10, petitioners argue that the court ruled against them by misapplying federal constitutional law. In numerous respects, that assertion is incorrect.

First, as set forth above, the court ruled that the petitioners could not demonstrate falsity as required under Louisiana law. Second, the court correctly ruled that state law governs the extent of protection to be given a publisher writing about a private plaintiff beyond the minimum protection required by *Gertz*. P.C.A. 7. Third, the court defined the showing to be made by a private-figure plaintiff under state law: "either (1) a false factual statement and fault on the newspaper's part (*Philadelphia Newspapers, Inc.* v. *Hepps*); or (2) a statement of opinion on a matter of public concern which reasonably implies false and defamatory facts and actual malice (*Mashburn* v. *Collin; Bussie* v. *Lowenthal*)." P.C.A. 8-9. And fourth, it ruled that petitioners had failed as to each element, both because the article was "substantially true" and also because even if it had been materially false, petitioners had failed to demonstrate the degree of fault required under state law. Apart from the state-law ruling on substantial truth, the separate and independent ruling on fault also was based on state, not federal constitutional, law.

In short, the state court invoked the federal Constitution to set forth the minimum protection required for a media defendant, and then looked to state law for additional protections. What petitioners in essence are asserting is that Louisiana may not, as a matter of law, provide protection to publishers beyond that provided

by the federal Constitution—a contention that is plainly without merit.[3] But because the Louisiana court ruled also that the article was "substantially true" as to petitioners, that issue, even if in dispute, is not presented. The court's determination of state law, and application of that law to the facts to hold that "truthful speech on a matter of public interest and concern," is "constitutionally protected," P.C.A. 10, does not warrant review by this Court.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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[3] See *Gertz, supra,* 418 U.S. at 347 (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"); see also cases cited at note 2, *supra.*